Supreme Court, U.S.
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No. 03-1283 MAR 1 3 2004

In The Supreme Court of the United States

BRADLEY EARL HACKER,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

Bryant J. Spann
ALLEN GUTHRIE McHUGH & THOMAS, PLLC
Post Office Box 3394
Charleston, West Virginia 25333-3394
(304) 345-7250

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED FOR REVIEW

Where an accused does not testify at trial and where his attorney neither forecasts his testimony nor invites comment on the accused's silence, does the prosecutor improperly comment on the accused's failure to testify—and, in this case, commit plain error—by arguing that certain evidence is "uncontroverted" or "not in dispute," when only the accused could have controverted that evidence?

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CITATION OF OPINIONS AND ORDERS

State v. Hacker, No. 031073 (W. Va. Nov. 19, 2003) (denying Mr. Hacker's petition for appeal), set forth at A. 1;[1] *State v. Hacker*, No. 02-F-295 (Kanawha Co. Cir. Ct. Jan. 9, 2003) (sentencing and commitment orders), set forth at A. 10, 14.

STATEMENT OF JURISDICTION

Petitioner Bradley Earl Hacker timely petitioned the Supreme Court of Appeals of West Virginia for discretionary review of his criminal convictions, which were obtained in the Circuit Court of Kanawha County, West Virginia. The Supreme Court of Appeals denied Mr. Hacker's petition on November 19, 2003. This petition for certiorari is timely filed within ninety days of the Supreme Court of Appeals' denial of Mr. Hacker's petition. Sup. Ct. R. 13.1. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a), as Mr. Hacker now seeks review of a final judgment rendered by the highest court of West Virginia, which judgment denied Mr. Hacker his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

RELEVANT CONSTITUTIONAL PROVISIONS

"No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

"No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

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[1]All references to items in the Appendix are denoted as "A. __."

STATEMENT OF THE CASE

A. Procedural History

At its May, 2002 term, a grand jury sitting in Kanawha County, West Virginia indicted Bradley Earl Hacker, charging him with first-degree murder, armed robbery, and possession of marijuana with intent to deliver. The case was tried from December 10 to 13, 2002, in Kanawha County Circuit Court. At the close of the evidence, the State elected to merge the murder and robbery counts and to present them as a single charge of felony murder. Trial counsel did not object to the improper comments that are the subject of this petition. The jury found Mr. Hacker guilty of felony murder and possession of marijuana with intent to deliver. Mr. Hacker was thereafter sentenced to consecutive terms of (1) life imprisonment without mercy for the felony murder conviction and (2) one to five years' imprisonment for the marijuana charge.

Mr. Hacker timely petitioned the West Virginia Supreme Court of Appeals for review of his convictions. In his petition for appeal, Mr. Hacker expressly sought plain error review of the issue on which he now seeks certiorari in this Court. The Supreme Court of Appeals denied Mr. Hacker's petition on November 19, 2003. A. 1.

B. Background Facts

In the early-morning hours of January 20, 2002, Jason Gill was shot to death on the side of a dark, country road near Tornado, West Virginia. Mr. Gill's body was discovered eight days later on a farm belonging to Mark and Lisa Webb. A. 16. Mrs. Webb is the mother of John Frye. A. 17. Although his case had not been resolved at the time of Mr. Hacker's trial, Mr. Frye has since pleaded guilty to murdering Mr. Gill. A. 30.

At Mr. Hacker's trial in December 2002, the State presented no eye-witness testimony regarding the circumstances of Mr. Gill's death. The record suggested that

only Messrs. Hacker and Frye were present when Mr. Gill was shot. And although the State had recovered a .380 caliber bullet from the body of Mr. Gill, the State did not offer any such gun into evidence. In fact, the State presented no evidence that Mr. Hacker ever had possessed a .380 caliber weapon, much less the murder weapon.

Further, the State introduced no marijuana into evidence, although it charged Mr. Hacker with possessing marijuana with intent to distribute. The State instead presented a completely circumstantial case against Mr. Hacker, a case that one of the prosecutors described as "a big puzzle of circumstantial evidence." A. 27-28.

1. **The shooting** Detective Greg Young of the Kanawha County Sheriff's Department testified for the State regarding a statement Mr. Hacker had given shortly before his arrest. In this statement, Mr. Hacker explained that, at approximately 10:45 p.m. on January 19, he received a call on his cell phone from Mr. Frye, who asked Mr. Hacker to pick him up. A. 16-17. After Mr. Hacker picked up Mr. Frye, Jason Gill called Mr. Hacker's cell phone, asking for Mr. Frye. A. 17. During the call, Messrs. Frye and Gill agreed to meet in order for Mr. Gill to sell five pounds of marijuana to Mr. Frye, and Mr. Hacker thereafter picked up Mr. Gill for purposes of this transaction. A. 17.

Mr. Hacker explained that he then parked his jeep at a wide spot on Coal River Road, where the three young men exited the jeep and began smoking a marijuana "blunt," or cigarette. A. 17. Thereafter, Mr. Frye dropped the blunt on the ground, and when Mr. Hacker and Mr. Gill bent down to look for it, Mr. Frye shot Mr. Gill three times, without warning. A. 17. Mr. Hacker immediately vomited. A. 17.

Although the State contended that Mr. Hacker took approximately $4000 in cash from the body of Mr. Gill, A. 26, no cash was recovered or offered into evidence.

2. **The marijuana charge** The State's primary witness regarding the marijuana charge was Sam Carte. Mr. Carte testified that, at approximately 2:05 a.m. on the night of the shooting, he received a telephone call from Mr. Hacker, who said that he was then in a car outside the apartment where Mr. Carte was staying. A. 18. Mr. Carte further testified that, in response to this phone call, he ran outside into the snow to meet with Mr. Hacker, who was sitting in his jeep. A. 19. *Mr. Hacker was alone.* A. 20. According to Mr. Carte, Mr. Hacker handed him "a little bag of marijuana." A. 20. Again, no physical evidence of this transaction—nor of any marijuana ever being in Mr. Hacker's possession—was introduced at trial.

3. **Prejudicial closing arguments** After the State rested its case, Mr. Hacker chose neither to testify nor to present any evidence. The State repeatedly exploited these constitutionally protected decisions in both the initial and rebuttal portions of its closing argument. Specifically, at least seven times in the first half of its closing—*before* Mr. Hacker's attorney had argued—the State referred to its evidence as "uncontroverted" or "not in dispute." Many of the "uncontroverted" pieces of evidence were ones that only Mr. Hacker could have rebutted through testimony. The most improper portions of the State's closing argument are as follows:

> [T]here are numerous elements in this case that are *not in dispute*. They have been *uncontroverted* and they have been proven to you beyond a reasonable doubt. We know that it was Bradley Earl Hacker there that night. Now, they dispute what his role was, but their – this is not a case where his defense said, it wasn't him, it was somebody else. So that

element has been established beyond a reasonable doubt.

A. 25 (emphasis added);

> And it's been *uncontroverted* that the substance, the substance that was delivered to Sam Carte, was, in fact, marijuana. *You didn't hear any testimony* or any cross-examination that, well, it was something else, it was oregano or something else. We know that these things have been established beyond a reasonable doubt.

A. 25 (emphasis added);

> So, now, we come back to the elements, ladies and gentlemen. I would submit to you that the elements that were *uncontroverted*, we've proved that he possessed the intent to deliver. We can – you can infer it was a large amount and you can infer from his actions, *he did deliver some of it to Sam Carte. The same with the elements of Murder in the First Degree, we know that money was taken from the person of Jason Gill.*

A. 28 (emphasis added).[2]

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[2] The prosecutor also made the following references to the uncontradicted nature of its evidence:

> [T]he court told you that in proving a Felony Murder, we must prove three things. We must prove the underlying substance of the offense itself. The commission of a First Degree Robbery. We must prove the death of a person as a result of the injuries sustained during the First Degree Robbery. And I would submit to you, again, that these elements are *not*

The State made other improper arguments as well. For example, the prosecutor personally vouched for the strength of the State's case: "This case is a classic example of why we, as prosecutors, are very confident when we come up and bring cases before jurors like yourself [sic]." A. 25. Further, the prosecutor improperly urged the jury to exact revenge on Mr. Hacker: "And I ask you when you go back there and deliberate and are deciding whether or not to grant him mercy, you show him the same amount of mercy he showed Jason Gill when he was gunned down that night, torched and buried in a shallow grave." A. 28.

In its rebuttal summation, the State also pointed to Mr. Hacker's father and questioned why he had not taken the witness stand to dispute the State's contention that he had hidden evidence for his son:

> Ladies and gentlemen of the jury, you may ask yourself, boy, that's kind of a wild story that

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> *in dispute*. These elements are *uncontroverted*. That have been proven beyond a reasonable doubt.

A. 26 (emphasis added)

"So when we're talking about aider and abettor, the Court instructed you that if you find that Brad Hacker was present at the time and place of the commission of the First Degree Robbery, *not in dispute*, again, he told the Kanawha County Sheriff's Department, he was there." A. 27 (emphasis added).

"And again, the element that's *not in dispute* is that he died as a result of the injury received." A. 27 (emphasis added).

> And again, the elements that are *not in dispute*, committing violence, obviously, the medical examiner testified that there's no doubt that Jason Gill died as a result of gun shot wounds, that he died and as a result of his death, he was permanently deprived of his money and that he died as a result of the injuries received during the commission of the First Degree Robbery.

A. 27 (emphasis added).

> Erin Dillon told about Brad saying my dad took [marijuana] out of there, but ladies and gentlemen of the jury, dad's sitting right there. Dad heard that testimony. Don't you think if that didn't happen that dad would have gotten up on that witness stand and said, I never did that? He didn't do it, did he? Because that's what happened, ladies and gentlemen of the jury. His own father hid the evidence for him.

A. 29.

By contrast, defense counsel made no reference to Mr. Hacker's expected testimony or to his silence. The closest he came in the entire trial was the following remark in his opening statement: "I don't know that you're going to hear anybody that saw the shooting or was there." A. 16.

4. Appellate proceedings The Supreme Court of Appeals denied Mr. Hacker's petition for appeal. A. 1. In its denial order, the court ignored the merits of the petition. A. 1-9. Instead, the order appears to be a "stock" denial order, which, in fact, incorrectly identifies Mr. Hacker's petition as one seeking appeal from a denial of habeas corpus. A. 2. The order consists primarily of the justices reciting their conflicting opinions as to whether, as a matter of policy, the Supreme Court of Appeals should automatically review the convictions of all defendants sentenced to life without mercy. A. 2-9. During this discussion, the dissenters flippantly refer to this Court as "the 'U.S. Supremes.'" A. 3.

REASONS FOR GRANTING PETITION

A. Introduction

In *Griffin v. California*, this Court held that the Fifth Amendment to the United States Constitution forbids a prosecutor or trial judge from commenting on a criminal

defendant's failure to testify in his defense. 380 U.S. 609, 615 (1965). While the Court has since refined its *Griffin* holding,[3] it has never answered the question squarely presented by this petition: Where an accused does not testify at trial and where his attorney neither forecasts his testimony nor invites comment on the accused's silence, does the prosecutor violate *Griffin* by arguing that certain evidence is "uncontroverted" or "not in dispute," when only the accused could have controverted that evidence?

The Circuit Courts of Appeal and the states are split over whether such arguments are error. In the First, Third, Seventh, Eighth, and Tenth Circuits, a prosecutor may not, without provocation from the defense, point to the "uncontradicted," "uncontroverted," or "undenied" nature of evidence that only the non-testifying defendant could dispute.[4] The Fifth Circuit appears to follow this rule as well, but has

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[3]*See, e.g., United States v. Robinson,* 485 U.S. 25 (1988) (no *Griffin* violation when prosecutor's comment is "fair response" to defense argument); *United States v. Hasting*, 461 U.S. 499 (1983) (comments on defendant's silence are subject to harmless error analysis); *Lakeside v. Oregon*, 435 U.S. 333 (1978) (trial court does not violate *Griffin* by instructing jury, over defense objection, to ignore defendant's silence); *Lockett v. Ohio*, 438 U.S. 586 (1978) (prosecutor's use of "uncontradicted" and "unrefuted" not an automatic *Griffin* violation where comment invited by defense); *Anderson v. Nelson*, 390 U.S. 523 (1968) (reversing conviction for *Griffin* violation); *Chapman v. California*, 386 U.S. 18 (1967) (harmless error analysis applies to *Griffin* violations).

[4]*E.g., Battenfield v. Gibson*, 236 F.3d 1215, 1225 (10th Cir. 2001); *United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999); *United States v. Bey*, 188 F.3d 1, 9 (1st Cir. 1999); *Yancey v. Gilmore*, 113 F.3d 104, 106-07 (7th Cir. 1997); *Linden v. United States*, 296 F. 104, 106-07 (3d Cir. 1924).

stated it only in the negative.[5] The Second, Sixth, Ninth, and Eleventh Circuits have recognized the logic of this rule, but, in applying it, have required additional analysis before finding error.[6] Only the Fourth Circuit has squarely rejected the rule.[7]

West Virginia and a majority of the other states follow the rule sought in this petition.[8] Only a handful specifically permit the State to argue that its evidence is uncontradicted,

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[5]*E.g.*, *United States v. Morrow*, 177 F.3d 272, 300 (5th Cir. 1999) ("Commenting on the absence of specific evidence in the record does not constitute a comment on the defendant's failure to testify when witnesses other than the defendant could have testified.").

[6]*E.g.*, *United States v. Mayans*, 17 F.3d 1174, 1185-86 (9th Cir. 1994); *United States v. Griggs*, 735 F.2d 1318, 1322 (11th Cir. 1984); *Butler v. Rose*, 686 F.2d 1163, 1170 (6th Cir. 1982); *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269-70 (2d Cir. 1969).

[7]*United States v. Francis*, 82 F.3d 77, 79 (4th Cir. 1996); *accord United States v. Davis*, 2003 WL 1871050 (4th Cir. Apr. 14, 2003).

[8]*E.g.*, *State v. Bennett*, 304 S.E.2d 35, 39 (W. Va. 1983); *Hammond v. State*, 549 So.2d 993 (Ala. Crim. App. 1989); *State v. Still*, 582 P.2d 639 (Ariz. 1978); *Aaron v. State*, 846 S.W.2d 655 (Ark. 1993); *People v. Medina*, 116 Cal. Rptr. 133 (Cal. Ct. App. 1974); *State v. Yoder*, 541 A.2d 141 (Del. Super. Ct. 1987); *White v. United States*, (D.C. 1969); *Rowley v. State*, 285 N.E.2d 646 (Ind.1972); *State v. Nelson*, 234 N.W.2d 368 (Iowa 1975); *State v. Johnson*, 541 So.2d 818 (La. 1989); *State v. Streeter*, 377 N.W.2d 498, 501 (Minn. Ct. App. 1985); *Brown v. State*, 340 So. 2d 718 (Miss. 1976); *State v. Morgan*, 444 S.W.2d 490 (Mo. 1969); *State v. Dymond*, 265 A.2d 9 (N.H. 1970); *State v. Sinclair*, 231 A.2d 565 (N.J. 1967); *People v. Watson*, 111 N.E. 243 (N.Y. 1916); *State v. Howard*, 838 S.W.2d 926 (Tex. App. 1992); *State v. Shattuck*, 450 A.2d 1122 (Vt. 1982).

where only a non-testifying defendant could contradict that evidence.[9]

The sheer volume of cases that have dealt with this fundamental, constitutional question over the years—and the disparate results they have reached—counsel strongly in favor of this Court granting certiorari here. *See Lent v. Wells*, 861 F.2d 972, 973 (6th Cir. 1988) (indirect reference to defendant's silence "is an issue which federal courts too frequently face"). Put simply, the protections of the Fifth Amendment should not vary from circuit to circuit, from state to state, or even from federal court to state court within the same city. In discussing the federal and state disagreement within Illinois, the Seventh Circuit has expressly noted the lack of guidance from this Court on the issue: "Comments by the prosecutor on the state of the evidence that may indirectly refer to the defendant's silence . . . have not been the subject of direct Supreme Court guidance." *Freeman v. Lane*, 962 F.2d 1252, 1260 (7th Cir. 1992); *accord Yancey v. Gilmore*, 113 F.3d 104, 107 (7th Cir. 1997).

For these reasons, and because Mr. Hacker's case presents multiple, clean examples of the improper argument discussed above, Mr. Hacker respectfully requests that this Court grant his petition.

B. <u>The Circuit Courts are split on this issue</u>.

Almost immediately after *Griffin* was decided, the Circuit Courts began considering how to apply *Griffin* to *indirect* references to a defendant's silence. Ten of the circuits have concluded that, under certain circumstances, a prosecutor's description of evidence as "uncontradicted,"

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[9]*E.g.*, *People v. Norman*, 190 N.E.2d 819 (Ill. 1963); *State v. Clarke*, 228 P. 582 (Nev. 1924), *overruled on other grounds*, *Harvey v. State*, 375 P.2d 225 (Nev. 1962); *State v. Alston*, 461 S.E.2d 687 (N.C. 1995); *Miller v. Commonwealth*, 149 S.E. 459 (Va. 1929).

where only the non-testifying defendant could contradict that evidence, is error.[10] Only the Fourth Circuit disagrees.

1. Ten Circuits support the rule. Of the ten circuits that have accepted the plain logic of the rule in question, the First, Third, Seventh, Eighth, and Tenth have essentially treated violation of that rule as *per se* error.

The First Circuit articulated the rule sought in this case in a line of decisions beginning the month after *Griffin* was decided. *See United States v. Flannery*, 451 F.2d 880, 881-82 (1st Cir. 1971); *United States v. Rodriguez-Sandoval*, 409 F.2d 529, 531 (1st Cir. 1969); *Desmond v. United States*, 345 F.2d 225, 227 (1st Cir. 1965). Its most succinct pronouncement appears in *Flannery*: "In 1965, we held that for the government to say, in summation to the jury, that certain of its evidence was 'uncontradicted,' when contradiction would have required the defendant to take the stand, drew attention to his failure to do so, hence was unconstitutional comment." 451 F.2d at 881. *Flannery* remains the law in the First Circuit. *United States v. Bey*, 188 F.3d 1, 9 (1st Cir. 1999).

Four months before *Flannery* was decided, the Seventh Circuit reached the same conclusion in *United States v. Handman*, 447 F.2d 853, 855 (7th Cir. 1971). That court later explained its *Handman* holding: "[W]hen a prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony, such reference necessarily focuses the jury's attention on the defendant's failure to testify and constitutes error." *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978). Through a long line of cases, the Seventh

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[10]Counsel has located no case in which the D.C. Circuit has expressed an opinion on this rule. At most, it has noted the rule, but found it inapplicable. *See United States v. Monaghan*, 741 F.2d 1434, 1438 (D.C. Cir. 1984).

Circuit has adamantly held to this rule. *E.g.*, *Yancey*, 113 F.3d at 106-07; *Freeman*, 962 F.2d at 1260 (collecting cases).

Although their precedent on the subject is not as extensive, the Third, Eighth, and Tenth Circuits likewise forbid the type of comments condemned in *Flannery* and *Handman*. *E.g.*, *United States v. Barton*, 731 F.2d 669, 674 (10th Cir. 1984) ("Because these remarks [as to lack of explanation for certain evidence] concern matters that could have been explained only by the accused, the remarks give rise to an innuendo that the matters were not explained because [defendant] did not testify."); *Tanner v. United States*, 401 F.2d 281, 288 (8th Cir. 1968) ("The references were veiled, but it is obvious that, as to each portion of the evidence referred to, the only person who was in a position to contradict it by direct evidence was [defendant]. The challenged statements were improper."); *accord Linden v. United States*, 296 F. 104, 106-07 (3d Cir. 1924).

Another group of circuit courts—the Second, Sixth, Ninth, and Eleventh—has acknowledged the logic of the rule, but has required "something more" before finding error. For example, the Sixth Circuit—while traditionally supporting the majority rule—holds that such comments are not *per se* error. *Butler v. Rose*, 686 F.2d 1163, 1170 (6th Cir. 1982). Where arguments violating the rule are made, the Sixth Circuit requires a "probing analysis" of the record to determine if they were, in fact, improper. *United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir. 1981). But even under this more rigorous analysis, the Sixth Circuit has since granted habeas corpus because of a prosecutor's repeated, uninvited arguments regarding the lack of contradiction as to facts only the defendant could contradict. *Lent*, 861 F.2d at 974-77.

While the Second Circuit generally seems to follow the majority rule, its decisions are at times confusing. In its first post-*Griffin* opinion on the subject, the Second Circuit

seemed both to recognize, and reject, this rule. *See United States ex rel. Leak v. Follette*, 418 F.2d 1266 (2d Cir. 1969). In *Leak*, the court points out that many courts do follow the rule: "[I]t has been held that remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony." *Id.* at 1269. Then, without rejecting or adopting the rule outright, the court suggests that it might not *really* follow it:

> We hold only that where the prosecutor confines himself to arguing the strength of his case by stressing the credibility and lack of contradiction of his witnesses, we will not be astute to find in this a veiled comment on the defendant's failure to testify *even if in practical fact, although not in theory, no one else could controvert them.*

Id. at 1270 (emphasis added).

Later opinions have differed as to how this Delphic holding should be applied. The Second Circuit itself has cited *Leak* in support of its formulation of the majority rule: "A constitutional violation occurs only if either *the defendant alone has the information to contradict the government evidence referred to* or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify." *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir. 1977) (citing *Leak*) (emphasis added). But the Ninth Circuit has cited language from *Leak* as *rejecting* the majority rule. *See United States v. Estrada de Castillo*, 549 F.2d 583, 584 n.1 (9th Cir. 1977); *see also Robinson*, 651 F.2d at 1197 (citing *Estrada de Castillo* as rejection of the rule).

The Ninth Circuit ultimately accepted the logic of the majority rule. *See United States v. Sehnal*, 930 F.2d 1420,

1425-26 (9th Cir. 1991); *Lincoln v. Sunn*, 807 F.2d 805, 810 (9th Cir. 1987). But in a later opinion, that court concluded that comments about the lack of dispute as to evidence that only a defendant could rebut are not error, unless the prosecutor does something further to "single out the defendant from the case in general." *United States v. Mayans*, 17 F.3d 1174, 1185-86 (9th Cir. 1994). Thus the Ninth Circuit, like the Sixth, seems to require "something more" than a straight violation of the rule before finding error.

The Eleventh Circuit's position is similar to that of the Ninth and Sixth Circuits. In *United States v. Griggs*, the court acknowledged that a comment on the failure of the defense to present evidence was equivalent to a comment on the defendant's failure to testify "where the rebuttal testimony or evidence could come only from the defendant." 735 F.2d 1318, 1322 (11th Cir. 1984). Although it found that such a comment had been made in *Griggs*, the Eleventh Circuit required the following, additional analysis to determine if the comment was error: "Prosecutorial comment is improper if the defense can demonstrate either that '(1) the prosecutor manifestly intended to comment on the defendant's silence, or (2) the character of the comment was such that a jury would naturally and necessarily construe it as a comment on the defendant's silence.'" *Id.* (citing *United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir. 1982)).

The analyses of the "something more" courts are logically at odds with those of the stricter courts, like the First and Seventh Circuits. For example, both the Seventh and Eleventh Circuits apply the "naturally and necessarily" rule to determine if *any* kind of prosecutorial statement is an indirect comment on a defendant's failure to testify. *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996); *Griggs*, 735 F.2d at 1322. However, the Seventh Circuit *automatically* treats the subset of statements at issue here—arguments as to lack

of contradiction where only a non-testifying defendant could contradict—as improper comment. *E.g., Cotnam*, 88 F.3d at 497. The Eleventh Circuit, by contrast, treats only *some* statements in that subset as error. In other words, the Eleventh Circuit (and apparently the Second, Sixth, and Ninth Circuits, for that matter) reasons that not all references to uncontradicted evidence that only the defendant could contradict "naturally and necessarily" refer to the defendant's silence; the Seventh and First Circuits hold that such statements *all* refer to the defendant's silence.

2. Only the Fourth Circuit flatly rejects the rule. The Fourth Circuit alone has staked out a fringe position on this fundamental issue of constitutional law. In a 1976 split decision, a Fourth Circuit panel suggested that it might follow the majority rule, given appropriate facts: "If the remark about [witness's uncontradicted] testimony stood alone, [defendant's] contention *might well have merit*." *United States v. Jenkins*, 544 F.2d 180, 180 (4th Cir. 1976) (citing *Flannery*, 451 F.2d 880) (emphasis added). But the majority concluded that, viewed in context, the argument at issue did not constitute a comment on the defendant's silence. *Id.* at 180-81.

In dissent, Judge Winter urged that the government's argument—that its star witness's testimony was "uncontradicted" on a point that only the defendant could contradict—was plain error. *See id.* at 181-82. Judge Winter relied on *United States v. Williams*, 479 F.2d 1138 (4th Cir. 1973), in which the Fourth Circuit had cited, but never adopted, the majority rule. *Jenkins*, 544 F.2d at 182.

The rule in the Fourth Circuit remained unsettled until *United States v. Francis*, 82 F.3d 77 (4th Cir. 1996). In *Francis*, the defendant argued for reversal under the majority rule, relying on the "might well have merit" dicta in *Jenkins*. *Francis*, 82 F.3d at 79. But the court, speaking through Judge

Luttig, held that *Jenkins* had actually rejected the rule:

> While in *Jenkins* we did suggest that a prosecutorial reference to "uncontradicted" evidence in circumstances where the only person who could possibly contradict the testimony was the nontestifying defendant 'might well' implicate the right against self incrimination, this suggestion was only *dictum. And, at that, the dictum was foreclosed by our holding in the case.*

Francis, 82 F.3d at 79 (emphasis added).

Subsequent unpublished opinions confirm that *Francis* indeed rejected the majority rule: "A prosecutor can characterize the evidence as 'uncontradicted,' even if the defendant was the only person who could have refuted such evidence." *United States v. Davis*, 2003 WL 1871050, at *2 (4th Cir. April 14, 2003) (citing *Francis*); *accord United States v. Nolberto Pena*, 2000 WL 541087, at *5 (4th Cir. April 27, 2000) (same).

The rule in the Fourth Circuit, therefore, is the polar opposite of the rule followed in the First, Third, Seventh, Eighth, and Tenth Circuits and it is, at the very least, fundamentally inconsistent with the holdings of the remaining circuits that have addressed this issue.

C. <u>The states are likewise divided</u>.

West Virginia and the great bulk of other states follow the federal majority rule. *See* note 8, *supra* (collecting cases). But a small minority of states disagree. *See* note 9, *supra* (collecting cases).

In West Virginia, the clearest application of the rule occurred in *State v. Bennett*, 304 S.E.2d 35, 39 (W. Va. 1983). In that case, a policeman testified that the defendant sold him drugs in a hand-to-hand transaction. *Id.* at 37, 38-39. The prosecutor then repeatedly argued that the policeman's

testimony regarding the transaction "had not been contradicted or denied." *Id.* at 38-39. In reversing Bennett's conviction, West Virginia's Supreme Court of Appeals held that these arguments were prejudicial error: "[T]he prosecutor's statements that no one had denied that appellant sold the drugs amounted to an impermissible comment on the appellant's failure to testify, *since appellant was the only one who could have denied it.*" *Id.* at 39 (emphasis added). West Virginia, therefore, clearly follows the majority rule.

Bennett remains the law in West Virginia. Since 1983, the Supreme Court of Appeals of West Virginia has repeatedly cited it as authority.[11] In one instance, the court expressly referred prosecutors to *Bennett* as an example of "guidance in this State on appropriate prosecutorial comment." *Hensler*, 415 S.E.2d at 888 n.1. Tellingly, exactly one week after it denied Mr. Hacker's petition, the court again cited *Bennett* in support of its reversal of a criminal conviction for improper comment on the defendant's failure to testify. *Sprague*, — S.E.2d. —, 2003 WL 22849957, at *4 n. 1.

Other states follow the opposite rule. Among them, Illinois has stated this holding very clearly: "This court has held that a prosecutor could properly call the attention of the jury to the fact that the State's evidence was uncontradicted *even though the circumstances were such that the defendant was the only person who could have denied the People's evidence*." *People v. Norman*, 190 N.E.2d 819, 821 (Ill. 1963)(emphasis added). As the Seventh Circuit pointed out in 1997, Illinois still follows this rule. *Yancey v. Gilmore*, 113 F.3d 104, 106-07 (7th Cir. 1997). Like the Circuit Courts

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[11] *E.g.*, *State v. Sprague*, — S.E.2d — , 2003 WL 22849957, at *4 n.1 (W. Va. Nov. 26, 2003); *State v. Mills*, 566 S.E.2d 891, 901 (W. Va. 2001); *State v. Hensler*, 415 S.E.2d 885, 888 n.1 (W. Va. 1992).

of Appeal, the states would benefit mightily from this Court's guidance as to how *Griffin* applies in these circumstances.

The federal and state splits on this issue can cause real practical problems for attorneys in, for example, West Virginia and Illinois. In West Virginia, the state follows the majority rule, but the federal district courts (being in the Fourth Circuit) do not. The opposite is true in Illinois, with the Seventh Circuit following the rule and the state courts rejecting it. Thus, in Charleston or Chicago, a different "version" of the Fifth Amendment applies, depending on which court tries a case. Only this Court can eliminate this anomaly, and it should do so by deciding this case.

D. <u>This Court has not yet addressed this issue</u>.

In the last sixteen years, this Court has not issued an opinion focusing on *Griffin*, its last substantive guidance appearing in *United States v. Robinson*, 485 U.S. 25 (1988). A partial review of this Court's post-*Griffin* decisions shows that the question raised here—how to treat uninvited, indirect comments on a defendant's failure to testify—remains an open one. *See Yancey*, 113 F.3d at 104 (Illinois rule, though in conflict with that of Seventh Circuit, "is not 'contrary to' Supreme Court precedent.").

Griffin itself held that direct comments by the prosecutor or court on a defendant's silence at trial violate the Fifth Amendment's protection against self-incrimination. 380 U.S. at 615.[12] Two years later, the Court held that such violations, although constitutional in nature, remain subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 24 (1967); *accord United States v. Hasting*, 461 U.S. 499 (1983) (same); *Anderson v. Nelson*, 390 U.S. 523 (1968)

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[12]The Fifth Amendment's protections are "incorporated" by the Due Process Clause of the Fourteenth Amendment, thus apply in state trials. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

(finding harmful, reversible error in *Griffin* violation). Next, the Court held that a trial court may instruct the jury to ignore the defendant's silence, even where the defendant objects to such an instruction. *Lakeside v. Oregon*, 435 U.S. 333 (1978).

In *United States v. Hasting*, the Court bypassed an opportunity to discuss the rule at issue here. 461 U.S. at 506 n.4. In that case the Seventh Circuit had reversed a conviction, finding error "when the prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony." *Id.* at 503. Rather than reach the substance of this ruling, the Court assumed that the prosecutor's argument was error, and held that the Seventh Circuit itself had erred in failing to conduct harmless error analysis. *Id.* at 506 n.4, 509.

In a concurring opinion, Justice Stevens did reach the merits of the Seventh Circuit's ruling. *Id.* at 512-16. He noted that the five defendants had presented a total of sixteen witnesses. *Id.* at 514. Justice Stevens then concluded that the prosecution's arguments had been proper under the facts of that case: "[The] central question [of the case] could have been addressed by defense witnesses and defense counsel *even without testimony by the defendants themselves*." *Id.* at 15 (emphasis added). Thus, in Justice Stevens's view, the rule simply did not apply to the facts at hand. *See id.* at 515 n.6.

Neither of the remaining post-*Griffin* decisions answers the question in this case. *See Robinson*, 485 U.S. at 32; *Lockett v. Ohio*, 438 U.S. 586 (1978). In both cases, the Court explained how *Griffin* applies when the defense itself has highlighted the defendant's silence. In *Lockett*, the Court held that the prosecution does not violate *Griffin* by referring to its evidence as "uncontradicted" or "unrefuted," where defense counsel has promised an extensive defense (in his

opening statement) and later (wrongly) tells the jury that the defendant would be the next witness. 438 U.S. at 595. Nothing in *Lockett* suggests whether the defendant *alone* could have rebutted the "unrefuted" or "uncontradicted" evidence at issue.

Robinson, by contrast, involved a prosecutor's *direct* comment on the defendant's failure to testify. 485 U.S. at 28. In that case, the prosecutor argued to the jury, "[Defendant] could've taken the stand and explained it to you, anything he wanted to." *Id.* But this otherwise illegal comment directly rebutted the defense closing, in which counsel had complained that the government had never given his client "a chance to explain." *Id.* Under those circumstances, this Court held that the prosecution's rebuttal was proper: "[W]here as in this case the prosecutor's reference to the defendant's opportunity to testify is a *fair response* to a claim made by defendant or his counsel, we think there is no violation of the [Fifth Amendment] privilege." *Id.* at 32 (emphasis added).

Neither *Robinson* nor *Lockett* applies to the facts of this case. Here, the series of improper comments appeared in the *first half* of the state's closing argument, thus cannot have *rebutted* any defense argument. Further, trial counsel in this case made no promise that the defendant would—or would not—testify. His only tangential, indirect allusion to the subject appeared in his opening statement, when counsel said, "I don't know that you're going to hear anybody that saw the shooting or was there." A. 16. This is a far cry from the promise of testimony or the door-opening argument that underlay the Court's reasoning in *Lockett* and *Robinson*, respectively. *See Lent v. Wells*, 861 F.2d 972, 976 (6th Cir. 1988) (distinguishing *Lockett* and *Robinson* where defense counsel, in *voir dire*, simply reminds jurors that defendant need not testify).

Thus, this Court has not addressed the specific question presented by this case.

E. Under West Virginia's rule, prosecutor's comments here were plain error.

Should the Court accept this petition, it must review the State's improper comments under the plain error standard, because trial counsel did not object to those comments. *See* Fed. R. Crim. P. 52(b). Even under this heightened standard, Mr. Hacker is entitled to a new trial.

The lack of defense objections is understandable here: Objecting to the State's improper comments may double, and—if followed by the court's instruction to ignore the comment—triple the jury's opportunity to notice those comments. *See United States v. Grunberger*, 431 F.2d 1062, 1068-69 (2d Cir. 1970) (defense counsel may not object to avoid underscoring prejudicial remark in jurors' minds). On the other hand, failing to object risks not preserving the error for appeal.

The First Circuit has recognized that the prosecution, not the defense, is at fault for creating such a conundrum: "Defendant did not object [to prosecutor's comment on his silence], perhaps fearful of making the matter worse, and the court's failure to interrupt may have been for the same reason. *The government had no right, however, to place the defendant in this dilemma.*" *Flannery*, 451 F.2d at 882 (emphasis added). For this reason, courts have not infrequently found plain error when a prosecutor comments on a defendant's failure to testify.[13]

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[13]*See, e.g., United States v. Barton*, 731 F.2d 669, 674 (10th Cir. 1984); *Rachel v. Bordenkircher*, 590 F.2d 200 (6th Cir. 1978); *United States v. Bates*, 512 F.2d 56 (5th Cir. 1975); *Flannery*, 451 F.2d 880; *Doty v. United States*, 416 F.2d 887, 889-90 (10th Cir. 1969); *United States v. Rodriguez-Sandoval*, 409 F.2d 529 (1st Cir. 1969); *United States v. Venable*, 443 F. Supp. 178 (E.D. Pa. 1977); *State v. Smith*, 420 P.2d

This case likewise calls out for reversal on plain error review. Under this standard, reversal is proper where there is (1) error, (2) which is plain, and (3) which affects substantial rights. *United States v. Olano,* 507 U.S. 725, 731 (1993). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Johnson,* 520 U.S. 461, 467 (1997) (internal quotations omitted).

1. State's argument was error. Under Rule 52(b), deviation from a legal rule is "error," unless there has been a waiver. *Olano*, 507 U.S. at 732-33. Waiver requires an intentional relinquishment of a known right, *id.* at 733; mere failure to object does not, without more, constitute a waiver, *see id.* at 733-34.

As explained above, *Bennett* remains good law. The State's summation also clearly and repeatedly violated *Bennett.* The plainest violation occurred with respect to the alleged marijuana transaction between Mr. Hacker and Sam Carte. Mr. Carte was the only witness who testified regarding this transaction. Mr. Carte testified that, at approximately 2:05 a.m. on the night Mr. Gill was shot, Mr. Carte received a telephone call from Mr. Hacker, who said that he was then in a car outside the apartment where Mr. Carte was staying. A. 18. In response to this phone call, Mr. Carte ran outside into the snow to meet with Mr. Hacker, who was sitting in his jeep. A. 19. *Mr. Hacker was alone.* A. 20. According to Mr. Carte, Mr. Hacker handed him "a little bag of marijuana." A. 20. No physical evidence of this transaction—nor indeed, of

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278 (Ariz. 1966); *People v. Wollenberg*, 229 N.E.2d 490 (Ill. 1967); *State v. Reed*, 583 S.W.2d 531 (Mo. Ct. App. 1979); *People v. Cavallerio*, 422 N.Y.S.2d 691 (N.Y. App. Div. 1979); *see also United States v. Arnold*, 425 F.2d 204 (10th Cir. 1970).

any marijuana ever being in Mr. Hacker's possession—was introduced at trial.

Early in its closing argument, the prosecution made the following, improper reference to Mr. Carte's testimony:

> And it's been *uncontroverted* that the substance, the substance that was delivered to Sam Carte, was, in fact, marijuana. *You didn't hear any testimony* or any cross-examination that, well, it was something else, it was oregano or something else. We know that these things have been established beyond a reasonable doubt.

A. 25 (emphasis added). Later in her closing, the prosecutor repeated her contention that the elements of the marijuana charge were "uncontroverted." A. 28.

By calling Mr. Carte's testimony on this point "uncontroverted," the prosecutor plainly referred to Mr. Hacker's failure to testify. No one but Mr. Hacker could have denied that what passed from his hand to Mr. Carte's hand in a dark parking lot in the middle of a snowy night was actually marijuana. *Bennett* condemned precisely this type of argument. 304 S.E.2d at 39. Not surprisingly, hand-to-hand drug transactions are an archetypal fact pattern for application of the rule sought in this case.[14]

Taken in context, the comments in this case were even worse than those in *Bennett*. At least in *Bennett* the drugs themselves were introduced into evidence, so that their identity could have been disproved through scientific analysis.

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[14] *E.g.*, *United States v. Buege*, 578 F.2d 187, 189 (7th Cir. 1978); *Desmond v. United States*, 345 F.2d 225, 227 (1st Cir. 1965); *Barnes v. United States*, 8 F.2d 832, 834-35 (8th Cir. 1925); *Hammond v. State*, 549 So.2d 993, 995 (Ala. Crim. App. 1989); *State v. Yoder*, 541 A.2d 141, 144 (Del. Super. Ct. 1987); *see also United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996) (face-to-face conversations about drug deal).

Bennett, 304 S.E.2d at 38. Here, nothing but the testimony of Mr. Hacker himself could have disputed the substance of Mr. Carte's testimony.

Importantly, the prosecutor here did not simply refer to the evidence of the marijuana transfer as "uncontroverted." She went further, emphasizing that there had been no additional *testimony* on the issue and speculating as to what that testimony might have been: "*You didn't hear any testimony* or any cross-examination that, well, it was something else, it was oregano or something else." A. 25 (emphasis added). Exactly who, other than Mr. Hacker, could possibly have given this missing testimony? Taken in context, this reference to lack of testimony "naturally and necessarily" reminded the jury that Mr. Hacker did not testify. *See Hasting*, 461 U.S. at 515 n.6 (Stevens, J., concurring).

Other comments in the prosecutor's closing likewise violated *Bennett*. For example, the prosecutor described as "uncontroverted" the fact that "money was taken from the person of Jason Gill." A. 28. If the state's evidence is believed, only Mr. Hacker and his co-defendant, Mr. Frye, were present when money was taken from Mr. Gill's person. No cash was introduced at trial, much less identifiable notes traceable to Mr. Gill. Mr. Frye was unavailable as a witness because of his then-pending criminal charges; therefore, only Mr. Hacker could have disputed the prosecution's theory that the money in question came from "the person of Jason Gill."

Finally, the prosecutor expressly pointed to Mr. Hacker's failure to dispute his presence at the scene of the shooting:

> And that there are numerous elements in this case that are *not in dispute*. They have been *uncontroverted* and they have been proven to you beyond a reasonable doubt. We know that it was Bradley Earl Hacker there that night.

> Now, they dispute what his role was, but their – *this is not a case where his defense said, it wasn't him, it was somebody else. So that element has been established beyond a reasonable doubt.*

A. 25 (emphasis added). Again, no one who was present at the shooting testified. Thus "his defense" could not have developed any testimony through cross-examination to disprove Mr. Hacker's presence at the scene. Logically, then, only Mr. Hacker's own testimony could have rebutted the suggestion that he was present at the shooting. This, too, was a violation of *Bennett.*

2. <u>These errors were plain</u>. To be "plain" under Rule 52(b), an error must be "'clear' or, equivalently, 'obvious'" under then-prevailing law. *Olano*, 507 U.S. at 734. As explained above, *Bennett* has been good law since 1983, and the state's violations of *Bennett*'s rule are clear and obvious.

3. <u>These errors affected Mr. Hacker's substantial rights</u>. An error "affect[s] substantial rights" when it is prejudicial to the defendant. *Olano*, 507 U.S. at 735. In other words, the error must have affected the outcome of the trial. *Id.* at 734.

West Virginia *always* treats comments on a defendant's failure to testify as prejudicial error: "It is *prejudicial error* in a criminal case for the prosecutor to make statements in final argument amounting to a comment on the failure of the defendant to testify." Syl. pt. 1, *Sprague*,— S.E.2d —, 2003 WL 22849957, at *1 (emphasis added); syl. pt. 1, *State v. Nuckolls*, 273 S.E.2d 87, 88 (W. Va. 1980); syl. pt. 3, *State v. Noe*, 230 S.E.2d 826, 826 (W. Va. 1976), *overruled on other grounds by State v. Guthrie,* 461 S.E.2d 163 (W. Va. 1995); *see also State v. Starcher*, 282 S.E.2d 877, 878 (W. Va. 1981)(confirming *Noe* holding).

But the prejudice of these comments is, in any event, plain. This case involves a homicide committed in the middle of the night on the side of a dark, country road. According to the State's evidence, Mr. Hacker would be one of two people in the world who actually knows what happened that night, and, of those two, only Mr. Hacker was in the courtroom. Further, the State argued that Mr. Hacker gave a portion of Mr. Gill's marijuana to Sam Carte as a "blood payment," *i.e.*, money intended to purchase an alibi from Mr. Carte. A. 26. As explained, this "blood payment" was made in a dark, snowy parking lot while Messrs. Hacker and Carte were alone.

As this Court has made clear, a prosecutor's improper arguments must be viewed "in context." *Robinson*, 485 U.S. at 33. Under these unique facts, it would have been *nearly* impossible for the jurors not to wonder why the defendant did not take the stand to personally dispute his guilt. *See Lakeside*, 435 U.S. at 344 (Stevens, J., dissenting) ("[T]he jury will probably draw an inference [from defendant's silence] despite instructions to the contrary.") But through its repeated references to the lack of dispute over various facts known only to Mr. Hacker, the State rendered the jury's *barely* possible task *humanly impossible*.

Nor is this a case in which the evidence was so overwhelming that no prejudice was possible. Here, there was no direct evidence of guilt: There was no eyewitness to the shooting. No physical evidence showed that Mr. Hacker fired or possessed *any* gun on the night of the shooting, much less the murder weapon, which never has been found. Likewise, no marijuana or drug paraphernalia was introduced into evidence. The State's case was, in the prosecutor's own words, "a big puzzle of circumstantial evidence." A. 27-28.

But the prosecution lacked the glue it needed to bind this puzzle: It lacked any credible acknowledgment by the

defendant that he actually knew Mr. Gill would be killed before it happened.[15] Through unconstitutional alchemy, the State converted Mr. Hacker's silence into that glue. This was prejudicial error.

The prejudice from these errors was amplified by the State's additional improper arguments. Specifically, the prosecutor vouched for the strength of her case. A. 25 ("This case is a classic example of why we, as prosecutors, are very confident when we come up and bring cases before jurors like yourself [sic]."). Federal and state courts have long forbidden such arguments.[16] She likewise exhorted the jury to exact revenge on Mr. Hacker by "show[ing] him the same amount of mercy he showed Jason Gill when he was gunned down that night, torched, and buried in a shallow grave." A. 28. The State may not exhort a jury to behave like a murdering mob.[17]

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[15]The State did present the testimony of Nicky Don Smith, a jailhouse informant who had received a sentence of probation partly because of his cooperation with the State. A. 21-24. Not surprisingly, Mr. Smith just happened to recall his jailhouse conversations with Mr. Hacker months later and on the *weekend before he was to be sentenced.* A. 24-25. Only Mr. Smith claimed to have heard Mr. Hacker acknowledge his guilt. The State ultimately told the jury it could "disregard" Mr. Smith's testimony. A. 28-29.

[16]*E.g, United States v. McCoy*, 771 F.2d 1207, 1211 (9th Cir. 1985) (prosecutor erroneously gave opinion that case was "extremely strong"); *United States v. Grunberger*, 431 F.2d 1062, 1068 (2d Cir. 1970) (prosecutor erroneously argued that he did not know of a stronger case); *People v. Bandhauer*, 426 P.2d 900, 904 (Cal. 1967) (same). Prosecutors may not invoke their own experiences as "an external standard" by which the jury may reach its decision. *Bandhauer*, 426 P.2d at 904.

[17]*E.g., Lesko v. Lehman*, 925 F.2d 1527, 1540, 1545 (3d Cir. 1991); *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992).

Finally, by expressly referring to Mr. Hacker's *father's* failure to take the stand and clear his name, *supra* at 6, the State further underscored its reference to Mr. Hacker's own failure to defend himself. Viewed in conjunction with these further statements, the State's indirect references to Mr. Hacker's failure to testify must have affected the outcome of his trial.

4. <u>These errors seriously affected the fairness, integrity, and public reputation of Mr. Hacker's trial</u>. When the State capitalizes on a defendant's failure to testify, it steps outside the very structure our criminal justice system. As this Court has explained, "[C]omment on the refusal to testify is a remnant of the *inquisitorial system of criminal justice*, which the Fifth Amendment outlaws." *Griffin*, 380 U.S. at 614 (emphasis added, internal quotations omitted). The right not to be tried under such a system is fundamental: "[T]he accusatorial rather than the inquisitorial process is a *fundamental part* of the 'liberty' guaranteed by the Fourteenth Amendment . . . ." *Id.* at 616 (Harlan, J., concurring) (emphasis added). Securing trials that are—at least in theory—free of illegal comments on a defendant's silence is a "prized achievement" of our justice system. *Robinson*, 485 U.S. at 44 (Marshall, J., dissenting).

Allowing comment on a defendant's silence, therefore, rewinds civil liberties to a time when self-incriminating testimony could be physically compelled. In explaining *Griffin*, Justice Stevens has alluded to this very fact: "By making silence 'costly,'. . . the trial judge's comments had an effect similar in kind, though not in degree, to a contempt ruling *or a thumbscrew*." *Lakeside*, 435 U.S. at 344 (Stevens, J., dissenting) (emphasis added). Therefore, *Griffin* itself was aimed at eradicating a remnant of pre-Enlightenment justice: "The Court concluded in *Griffin* that *unconstitutional compulsion was inherent* in a trial where prosecutor and judge

were free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand." *Lakeside*, 435 U.S. at 339-40 (emphasis added).

This case does not involve the direct comments that the Court condemned in *Griffin*. But this is a difference of degree, not of kind. *Griffin* forbids the use of the following logic: The non-testifying defendant must be guilty, because an innocent person would take the stand. A trial is no less unfair just because the prosecutor is savvy enough to cloak this inquisitorial logic in innuendo. In other words, can the State employ a "thumbscrew," so long as it is slick about it? Of course not. By doing so in this case, the prosecutor acted wholly at odds with the structure of our justice system and seriously affected the fairness and integrity of Mr. Hacker's trial. Furthermore, allowing a courtroom to be converted to a place of inquisition, even once, tarnishes the public reputation of all proceedings conducted there.

CONCLUSION

The Circuit Courts of Appeal and the states are split on the question presented here. By granting this petition, the Supreme Court of the United States can provide much needed clarity on a fundamental issue of constitutional law that arises with alarming frequency in both federal and state trials. Further, certiorari is sorely needed to redress the resulting unfairness of Mr. Hacker's trial. For these reasons, Mr. Hacker, who is serving a sentence of life without the possibility of parole, prays that this Court will accept his petition for writ of certiorari.

Respectfully submitted,

Bryant J. Spann
ALLEN GUTHRIE
McHUGH & THOMAS, PLLC
Post Office Box 3394
Charleston, WV 25333-3394
(304) 345-7250

No. _____

In The Supreme Court of the United States

BRADLEY EARL HACKER,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

APPENDIX

Bryant J. Spann
ALLEN GUTHRIE McHUGH & THOMAS, PLLC
Post Office Box 3394
Charleston, West Virginia 25333-3394
(304) 345-7250

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of November, 2003, the following order was made and entered.

State of West Virginia, Plaintiff Below,
Respondent

vs.) No. 031073

Bradley Earl Hacker, Defendant Below,
Petitioner

On a former day, to-wit, May 22, 2003, came the petitioner, Bradley Earl Hacker, by Bryant Spann, Allen Guthrie McHugh & Thomas; Gregory J. Campbell, Campbell & Turkaly; and S. Benjamin Bryant, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 9th day of January, 2003, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

Chief Justice Starcher and Justice Albright would grant the defendant's petition and would have this matter fully briefed and set on the argument docket. They state, as grounds for this position, as follows:

> We believe that the Court should give full appellate review, with full briefing and oral argument, to all cases involving life imprisonment without the possibility of parole, whether those cases are before us on direct appeal, or, as here, are before us on appeal from denial of habeas corpus relief where the original appeal was refused. Our reasons are somewhat overlapping.
>
> First, without full state court appellate review, such criminal convictions do not have any sort of "stamp of approval" or presumption of correctness, in any subsequent or collateral proceeding—for example, in federal or state habeas corpus. As an example, this Court recently refused to review a life-with-no-parole murder conviction. *Then, the Supreme Court of the United States reversed this Court, saying that the conviction may have violated established constitutional law, and remanded the matter for further proceedings. Flippo v. W. Va.*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999). (Chief Justice Starcher notes that he voted not to review this case, a vote of which he now repents.) The Supreme Court noted that *the last court to rule on the merits*

of the case was the Circuit Court of Fayette County. We find this rather embarrassing—to have a West Virginia trial court's errors fixed by the "U.S. Supremes"—without this Court even taking a look at the issues first. Moreover, the day may well come when the Supreme Court of the United States (or even this Court) requires full appellate review of such cases as a matter of due process. We would support such a position. If that day comes, this Court does not want to find itself in a position of having to deal with whether such a ruling might be retroactive.

Second, merely looking at the appeal petitions in these cases means we do not get the benefit of the West Virginia Attorney General's review—as is ordinarily the case when a petition is accepted, briefed, and and argued. When there is a full review, the Attorney General's office will often recognize and acknowledge clear error when it is present—although they may argue that such error was harmless. Simply put, Attorney General involvement means better quality briefs and argument, and improves the quality of justice.

Third, full appellate review assures that important issues in these "life-without-the-possibility-of-parole" cases are brought to the attention of the bar generally, and can be followed by interested lawyers. When cases are briefed and argued and an opinion is to be

written, *amici*, or other voices may ask to be heard on important isuses.

Fourth, our criminal jurisprudence is better reasoned and developed when such cases are briefed and dealt with in an opinion. Where we uphold a conviction (as we do in most cases), opinion writing forces the Court to consciously recognize and articulate its reasoning. Additionally, as one of three co-equal branches of government, we have a duty to reflect on what is going on in our court system and our broader society, that leads to such severe criminal sentences.

Fifth, when the Court accepts life-without-the-possibility-of-parole cases for full briefing and argument, we can (in appropriate cases) appoint new counsel, so that exceptionally important issues will be properly presented. It is apparent to us that some defendants do not have their issues well raised, due to inexperienced counsel preparing their petitions. Regrettably, but inescapably, the quality of an appeal petition can make some difference as to whether or not we accept a case for full argument.

Finally, we should have these cases argued and briefed because the consequences of error at trial are so extreme. In Illinois, since the reinstatement of the death penalty, as many people as have been executed have been *freed from death row* from trial errors. Here in West Virginia, we know all about the Fred Zain

> case. We know that trials can be unfair, and criminal convictions can be downright wrong. Where the sentence is one that deprives a person even of the *possibility* of parole, simple fairness means that we must take the steps that will try to detect any unfairness in the proceedings that led to the sentence.

Justices Davis and Maynard voted to refuse the defendant's petition. For the reasons set forth below, Justices Davis and Maynard believe that the Court's discretionary review procedure in cases involving a sentence of life without the possibility of parole is constitutionally sound.

> **1. The Court has affirmed the constitutionality of discretionary review in cases involving life without the possibility of parole.** In *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990), the defendant argued that discretionary review of cases involving life without the possibility of parole violated state and federal due process guarantees. This Court pointed out in *Billotti* that over one hundred years ago the United States Supreme Court had held in *McKane v. Durston*, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894), "that appellate review is not an element of due process of law, and, consequently, that there is no constitutional right to an appeal." *Billiotti*, 183 W. Va. at 52, 394 S.E.2d at 36. We recognized in

syllabus point 1 of *Wingfield v. Neal*, 60 W. Va. 106, 54 S.E. 47 (1906), in part, that "[a]n appeal was unknown to common law." In rejecting the defendant's challenge to our discretionary review procedure, we held in *Billotti* that "[a]n examination of our own practice of reviewing petitions for appeal reveals that, although there are 'significant discretionary elements,' the procedure comports with the due process requirements of both the federal and state constitutions." 183 W. Va. at 53, 394 S.E.2d at 37. This Court recognized in *State v. Legg*, 151 W. Va. 401, 151 S.E.2d 215, 218 (1966), "[o]ne convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error."

2. The Fourth Circuit has affirmed the constitutionality of our discretionary review in cases involving life sentences without the possibility of parole. In *Billotti v. Legursky*, 975 F.2d 113 (4th Cir. 1992), (this case and *Billotti v. Dodrill*, which was discussed previously, involved the same defendant), the defendant argued "that due process required an appeal as of right, with full review on the merits by the West Virginia Supreme Court of Appeals." 975 F.2d at 115. The Fourth Circuit rejected this argument and, in doing so, made the following observations:

It is plain that West Virginia has afforded Billotti an adequate opportunity to challenge

the alleged errors in his trial. The Fourteenth Amendment does not authorize the federal courts to micro manage state criminal justice systems. In our federal system, the states are allowed to structure their systems of criminal justice as they see fit, as long as their systems satisfy the basic demands of due process. There is often no one best way of doing things . . . .

Indeed, petitioner has not explained how an appeal as of right would have increased the accuracy of the determination that he received. In many jurisdictions, appeal as of right is conducted without oral argument, with screening by staff attorneys, or with limited briefing. We cannot see how such streamlined systems deliver a more meaningful opportunity to be heard than does West Virginia's system of discretionary appeals. West Virginia allowed Billotti to communicate his claims of legal error to the reviewing tribunal, accompanied by a record of the proceedings below necessary to evaluate his arguments. We believe that due process requires no more.

Billotti, 975 F.2d at 116-117 (internal citations omitted). *See also Foster v. Hedrick*, 856 F.2d 186 (4th Cir. 1988) (unpublished opinion) (finding no due process violation in denial of petition for appeal in case involving life without possibility of parole).

3. It would be unfair to carve out a special review policy. Assuming, for the sake of argument, that this Court could carve out a

special review policy for defendants sentenced to life without the possibility of parole, I believe such a policy would unfairly discriminate against all other litigants seeking an appeal to this Court. Every litigant petitioning for appeal believes that his or her case has merit and should be heard. Why should this Court have a policy of reviewing all cases involving life without the possibility of parole, but deny such treatment in termination of parental rights cases, child abuse and neglect cases, cases where million dollar verdicts have been awarded, or wrongful death cases where no liability was found?

4. Our system of discretionary review works. Our system of discretionary review of cases involving a sentence of life without the possibility of parole works. Proof of this fact is found in the number of such cases overturned by federal courts. In my review of petitions filed to the United States Supreme Court by State criminal defendants, I found only one case involving a sentence of life without the possibility of parole where the Supreme Court disturbed this Court's disposition denying full appellate review. The case was *Flippo v. West Virginia*, 528 U.S. 11, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999). In reviewing opinions of the Fourth Circuit of Appeals, I did not discover any case where habeas relief was granted to a State defendant who had been sentenced to life without the possibility of parole, and was denied full

review by this Court. In my review of federal district court published decisions, I found only two cases where habeas relief was granted to defendants, sentenced to life in prison, after we denied full review. Neither case indicated whether the defendants were eligible for parole. *See Kinder v. Boles*, 253 F.Supp 817 (N.D. W. Va. 1966); *Holland v. Boles*, 225 F.Supp. 863 (N.D. W. Va. 1963). The *Holland* defendant was subsequently retried and convicted of first degree murder. *See State v. Holland*, 149 W. Va. 731, 143 S.E.2d 148 (1965). I believe this Court's record in federal courts speaks well of the integrity and thoroughness of our system of discretionary review of cases involving life without the possibility of parole.

A True Copy

Attest:/s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA

v. CRIMINAL NO. 02-F-295; Ct. 1 & Ct. 3
JUDGE JAMES C. STUCKY

BRADLEY EARL HACKER

ORDER

On the 8th day of January, 2003, came the defendant, **BRADLEY EARL HACKER,** having been found guilty by a jury on the 13th day of December, 2002, to the felony offenses of First Degree Murder in the Commission of First Degree Robbery and Possession with Intent to Deliver a Schedule 1 Controlled Substance to wit: Marijuana, provable offenses as contained in Count One and Count Three of said Indictment No. 02-F-295, appeared in Court in the custody of the Sheriff, together with his counsel, Gregory J. Campbell and S. Benjamin Bryant, and also came the State of West Virginina by Kimberly P. Hindman and Donald P. Morris,

Assistant Prosecuting Attorneys in and for Kanawha County, West Virginia.

THEREUPON, it was demanded of the said **BRADLEY EARL HACKER**, if anything he had or knew to say why the Court should not now proceed to pronounce the sentence of the law against him, and no valid reason being offered or alleged in delay of judgment, it is considered by the Court as follows:

02-F-295; Count 1: That the defendant, **BRADLEY EARL HACKER**, be committed to the custody of the West Virginia Department of Corrections for the rest of his natural life, with credit for time spent in jail while awaiting trial and conviction, which credit for time spent is 341 days.

02-F-295; Count 3: That the defendant, **BRADLEY EARL HACKER**, be committed to the custody of the West Virginia Department of Corrections for an indeterminate term of not less than one (1) year nor more than five (5) years, said sentence to run **CONSECUTIVE** to and not concurrent with

the sentence imposed by this Court in Count 1 of Indictment No. 02-F-295.

It is further **ORDERED** that the proper officer do, as soon as possible, remove and safely convey the said **BRADLEY EARL HACKER** from the South Central Regional Jail to the custody of the West Virginia Department of Corrections, to be kept imprisoned and maintained in the manner prescribed by law.

WHEREUPON, the prisoner was remanded to the South Central Regional Jail. **TO ALL OF WHICH COUNSEL FOR THE DEFENDANT OBJECTS AND EXCEPTS.**

Enter this 8th day of January, 2003.

/s/ James C. Stucky
JAMES C. STUCKY, Circuit Judge
Thirteenth Judicial Circuit

INSPECTED BY:

/s/ Michael Clifford
ASSISTANT PROSECUTING ATTORNEY

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 9TH DAY OF JANUARY 2003.
/s/ Cathy S. Gatson/JF CLERK CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

/s/ Gregory J. Campbell
COUNSEL FOR
DEFENDANT

COMMITMENT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. CRIMINAL ACTION NO. 02-F-295

BRADLEY EARL HACKER

ON THIS 8th day of January, 2003 came the attorney for the State and the defendant appearing in person and represented by Gregory J. Campbell and S. Benjamin Bryant, his counsel.

IT IS ADJUDGED that the defendant having been found guilty by a jury on the 13th day of December, 2002, has been convicted of the offenses as charged: 02-F-295 Count 1, First Degree Murder in the Commission of First Degree Robbery, and 02-F-295 Count 3, Possession with Intent to Deliver a Schedule 1 Controlled Substance to wit: Marijuana, and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Department of Corrections for imprisonment for a period of: 02-F-295 Count 1, for the rest of his natural life, with credit for time spent in jail while awaiting trial and conviction, which credit for time spent is 341 days, and 02-F-295 Count 3, for an indeterminate term of not less than one (1) nor more than five (5) years, said sentence to run CONSECUTIVE to and not concurrent with

the sentence imposed by this Court in Count 1 of Indictment No. 02-F-295.

CONVICTION DATE:	December 13, 2002
SENTENCE DATE:	January 8, 2003
EFFECTIVE SENTENCE DATE:	February 1, 2003

IT IS ADJUDGED THAT: **SEE CERTIFIED COPY OF ORDER ATTACHED.**

IT IS ORDERED that the Clerk forthwith transmit this record, duly certified, of the judgment and commitment to the Warden of the West Virginia Penitentiary and that their record serve as the commitment of the defendant.

JAMES C. STUCKY JUDGE	/s/ James C. Stucky JUDGE
CATHY S. GATSON CLERK	/s/ Cathy S. Gatson CLERK
JANE A. VREDEVELD DEPUTY CLERK	/s/ Jane A. Vredeveld DEPUTY CLERK

Certified this 9th day of January, 2003.

SEAL:

***EXCERPTS FROM TRIAL TRANSCRIPT**, State v. Hacker*, No. 02-F-295 (Kanawha Co. Cir. Ct. Dec. 10-13, 2002)

Defense opening argument, Tr. 245:13-15:

"I don't know that you're going to hear anybody that saw the shooting or was there."

***

Direct examination of Trooper Mike Lafauci, Tr. 491:4-9:

"Q. And that call came from Lincoln 911? And what did 911 advise you concerning the phone call of Mark Webb?

A. They advised that Mr. Webb had found a shallow grave on his property, which was located in Alum Creek."

***

Direct examination of Detective Greg Young, Tr. 672:21 through 674:3:

"Q. Detective Young, at this time, could you tell the ladies and gentlemen what Bradley Hacker, the Defendant, told you in the early morning hours of February the 1st, 2002, in reference to what happened on the night of January the 19th of 2002?

A. Yes. Brad said he had been at Erin's apartment at Sable Point until around 10:30 when he left. Brad said he went to a convenient store that was near there -- near Sleepy Hollow and the convenience store had wood siding on it. Brad said about 10:45 his cell phone rang and it was Johnny Frye who

asked him to pick him up at his girlfriend Tiffany's house. And Brad said he went to Tiffany's house and picked up Johnny. Brad said after picking up Johnny, Jason Gill called for Johnny on Brad's cell phone. Brad said that Johnny was supposed to get five pounds of pot from Gill on a pot deal. Brad said that he and Frye met Jason Gill at Jason Gill's mom's house, where Jason left his mom's jeep in front of the house. And Brad said Jason threw two WalMart bags into Johnny into the jeep and Jason got into the jeep with Frye and him. Brad said they went to a spot on Coal River Road passed Durands Grocery, where you can turn into the water. Brad said they all three got out of the jeep and were smoking a blunt when Johnny said the blunt dropped and Brad said he and Gill bent over looking for it when Johnny shot Gill three times without warning. Brad said that at that time, he puked and Johnny told him calm down, calm down."

***

Direct examination of Lisa Webb, Tr. 774:6-11:

"Q. Could you state your name, please

A. Lisa Webb.

Q. And Mrs. Webb, where do you live?

A. Tornado.

Q. And are you related to John Frye?

A. Yes, sir. I'm his mother."

***

Direct examination of Sam Carte, Tr. 828:8 to 830:19:

"Q. Okay. I'm going to direct your attention to the early morning hours of January 20th, which would have been the Sunday after the Saturday, and ask if you were still at the bachelor party --

A. Yes.

Q. -- in the early morning hours?

A. Yes.

Q. Did you receive a cell phone call from Mr. Hacker at about 2:05 a.m.?

A. Yes.

Q. Okay. And what, if anything, did Mr. Hacker say when he called you on the cell phone?

A. Just that he was outside the door, for me to come outside.

Q. Okay. He was outside the door?

A. He was outside in his car.

Q. Okay. And he wanted you to come outside?

A. Yeah.

Q. Did you ask him to come in?

A. Yeah. I told him to come in. He said he was in a hurry, he had to get back somewhere or something. I'm not really sure what he said. Like I said, I was at the bachelor party all night. And it was snowing. We were almost ready for bed, in fact. I had on a pair of shorts. I slipped on a pair of flip flops and ran out in the snow.

Q. Okay. When you got outside, did you see the defendant?

A. Yes.

Q. And where was he at?

A. He was inside his vehicle.

Q. Okay. Was that the same vehicle he had earlier in the evening?

A. Yes.

Q. What kind of vehicle was it, if you remember?

A. A black jeep.

Q. Okay. When you got outside, did you have a conversation with him?

A. For a split second. Just for a split second.

Q. What, if anything, did the defendant do?

A. Nothing really, just talked to me for a second.

Q. Okay. Did he give you anything?

A. Yeah. He gave us a little bag of marijuana.

Q. Okay. And what did his mood seem like when he handed you the bag of marijuana?

A. Fine. Same old Brad, I know.

Q. Okay. Did he say anything to you in reference to giving you the marijuana?

A. Just that he was -- he said he was sorry for not being at the bachelor party and he said, "Here you go. Have some fun. See you later."

Q. And did he leave?

A. And he left.

Q. Was anybody with him?

A. No."

***

Direct examination of Nicky Don Smith, Tr. 835:6-21:

"Q. Mr. Smith, I'm going to direct your attention to the month of February and March of 2002, and ask if you were incarcerated at the South Central Regional jail?

A. Yes, sir, I was.

Q. Had you, on February 27, 2002, entered a plea of guilty to an unlawful wounding of battery before Judge Irene Berger?

A. Yes, sir, I did.

Q. And were you pending sentencing during the month of February and March of 2002?

A. Yes, sir, I was.

Q. During the time that you were incarcerated at the South Central Regional Jail, did you meet an inmate by the name of Brad Hacker?

A. Yes, sir, I did."

***

Direct examination of Nicky Don Smith, Tr. 841:5 through 843:23:

"Q. Let me ask you this, before you tell the ladies and gentlemen of the jury what Mr. Hacker told you about his

case, did there come a time when you contacted your public defender in reference to information that Mr. Hacker was telling you about the murder case?

A. Yes, sir.

Q. And as a result of that, were you contacted by a Detective from the Kanawha County Sheriff's Department?

A. Yes, sir, I was.

Q. And did they take a statement from you on July the 26th of this year?

A. That sounds about the right date, yes, sir.

Q. You had already entered a plea agreement sometime before that with the State of West Virginia before this statement?

A. Yeah. Way before this, I already took a plea agreement.

Q. So you were awaiting sentencing?

A. Yes, sir.

Q. At the time you gave a statement, were you advised further of a -- that the State of West Virginia would make some recommendations as to your sentence on your conviction in front of Judge Berger?

A. Can you repeat that again, please.

Q. Did you become aware, after giving your statement, that the State of West Virginia would make certain recommendations as to your sentence in front of Judge Berger at the time you were sentenced?

A. What was told to me, like as I said, my plea agreement was already signed and I already knew what my future faced. The only thing that they told me, Mr. Morris, was that they would possibly make a recommendation for incarceration to stay outside the prison to stay in the jail in the county.

Q. So the State's recommendation was, at the time of sentencing, that if you were sentenced to incarceration, it would be served in the jail, rather then in the penitentiary; is that correct?

A. Yes, sir.

Q. But you were still going to be locked up and serve sentence?

A. Yes, sir.

Q. Did the State also recommend that your sentence for the unlawful wounding and battery, to be run concurrently?

A. Yes, sir.

Q. And you have been sentenced by Judge, Irene Berger; is that correct?

A. Yes, sir.

Q. At the time of sentencing, did the State tell the Court that you were cooperating in the murder case?

A. Yes, sir.

Q. And did the State recommend that you serve your sentence at the South Central Regional Jail?

A. Yes, sir, that was the recommendation.

Q. As a result of that, what did the Judge do?

A. Bless Irene Berger's heart, she gave me probation."

***

Cross-examination of Nicky Don Smith, Tr. 873:16 through 874:3:

"Q. They didn't? So, you get sentenced on Monday the 29th; is that correct? Does that sound right?

A. That's right when I got back from the Anthony Center.

Q. And at 5:12 p.m. on Friday evening, before the Monday you get sentenced, you give a statement to the police, don't you?

A. Yeah. I give a statement to the police.

Q. The next working day, you appear before the Judge, Monday?

A. That sounds about right, yes, sir."

***

State's closing argument, Tr. 982:9 through 984:4:

"This case is a classic example why we, as prosecutors, are very confident when we come up and bring cases before jurors like yourself. Reasonable doubt is essentially common sense. Looking at things and applying common sense. I would submit to you, ladies and gentlemen of the jury, and I would tell you, rather, that in every criminal case the elements that are contained in a criminal offense, we must prove each and every element beyond a reasonable doubt. And that there are numerous elements in this case that are not in dispute. They have been uncontroverted and they have been proven to you beyond a reasonable doubt. We know that it was Bradley Earl Hacker there that night. Now, they dispute what his role was, but their -- this is not a case where his defense said, it wasn't him, it was somebody else. So that element has been established beyond a reasonable doubt. We also know it was in Kanawha County. We know that it occurred on or about the 20th of January, 2002. And it's been uncontroverted that the substance, the substance that was delivered to Sam Carte was, in fact, marijuana. You didn't hear any testimony or any cross-examination that, well, it was something else, it was Oregano or something else. We know that these things have been established beyond a reasonable doubt. What is going to be disputed, as I told you in the beginning of this case, in terms of Bradley Earl Hacker's involvement in this, is that he knowingly possessed with an intent to deliver and that, obviously, that marijuana was the

marijuana that was taken off Jason Gill that night. The offense of Felony Murder; the court told you that in proving a Felony Murder, we must prove three things. We must prove the underlying substance of the offense itself. The commission of a First Degree Robbery. We must prove the death of a person as a result of the injures sustained during the First Degree Robbery. And I would submit to you, again, that these elements are not in dispute. These elements are uncontroverted. They have been proven beyond a reasonable doubt."

***

State's closing argument, Tr. 985:15-20:

"And he tells Jessica that the crazy thing they're going to do is they're going to get $8,000.00 and split it $4,000.00 each. And remember the next day, too, he further, by saying, in fact, that did happen, they split it four and four.

***

State's closing argument, Tr. 987:2-7:

"Also, what I call, the blood payment to Sam Carte, when he goes back to that bachelor party and he calls him out there and he says, I'm sorry I couldn't make it back, this is for the guys. That's almost an unwitting payment for the use of that alibi."

***

State's closing argument, Tr. 988:19 through 989:9:

"So when we're talking about aider and abettor, the Court instructed you that if you find that Brad Hacker was present at the time and place of the commission of the First Degree Robbery, not in dispute, again, he told the Kanawha County Sheriff's Department, he was there. And that he knowingly aided and abetted by encouragement or assistance from counsel. Ladies and gentlemen of the jury, again from start to finish, that's all Brad Hacker did in this case. He set up the meeting. He drove them there. He helped, obviously, destroy the body. And again, the element that's not in dispute is that he died as a result of the injury received."

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State's closing argument, Tr. 990:1-8:

"And again, the elements that are not in dispute, committing violence, obviously, the medical examiner testified that there's no doubt that Jason Gill died as a result of gun shot wounds, that he died and as a result of his death, he was permanently deprived of his money and that he died as a result of the injuries received during the commission of the First Degree Robbery."

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State's closing argument, 990:23 through 991:3:

"The Court talked to you about direct and circumstantial evidence. This case is largely a big puzzle of circumstantial

evidence that comes together before you to use your common sense."

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State's closing argument, Tr. 999:17 through 1000:2:

"So, now, we come back to the elements, ladies and gentlemen. I would submit to you that the elements that were uncontroverted, we've proved that he possessed the intent to deliver. We can -- you can infer it was a large amount and you can infer from his actions, he did deliver some of it to Sam Carte. The same with the elements of Murder in the First Degree, we know that money was taken from the person of Jason Gill."

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State's closing argument, Tr. 1001:11-16:

"And I ask you when you go back there and deliberate and are deciding whether or not to grant him mercy, you show him the same amount of mercy he showed Jason Gill when he was gunned down that night, torched and buried in a shallow grave."

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State's rebuttal closing argument, Tr. 1034:7-12:

"And if you don't like Nickey Don Smith because he had a car wreck and he killed somebody and because he was in jail, throw his testimony out, disregard it. If you don't want to

believe what Nickey Don Smith told you that Brad Hacker told him, throw it out, disregard it."

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State's rebuttal closing argument, Tr. 1046:11-22:

"Ladies and gentlemen of the jury, you may ask yourself, boy, that's kind of a wild story that Erin Dillon told about Brad saying my dad took that out of there, but ladies and gentlemen of the jury, dad's sitting right there. Dad heard that testimony. Don't you think if that didn't happen that dad would have gotten up on that witness stand and said, I never did that? He didn't do it, did he? Because that's what happened, ladies and gentlemen of the jury. His own father hid the evidence for him."

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Reading of verdict, Tr. 1064:7-18:

"THE COURT: Would you hand that to the bailiff, please. I will now read the verdict: State of West Virginia versus Bradley Earl Hacker, criminal case 02-F-295. Count 1: We the jury find the defendant, Bradley Earl Hacker guilty of the offense of First Degree Murder in the commission of a First Degree Robbery. Count 3: We, the jury, find the defendant, Bradley Earl Hacker guilty of the offense with the Possession of a Schedule 1 controlled substance, to-wit: Marijuana, signed Kirk L. King, foreperson, dated 12-13-02."

EXCERPT FROM PLEA HEARING, *State v. Frye*, No. 02-F-296 (Kanawha Co. Cir. Ct. Apr. 10, 2003)

"THE COURT: Thank you. At this time, Mr. Frye, I'm going to ask you how you plead, guilty or not guilty, to the felony offense of murder as contained in Count One of the Felony Indictment 02-F-296?

MR. FRYE: Guilty."